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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. 450

H. B. WOLFSEN, HELEN WOLFSEN, L. C. WOLFSEN, AND MYRNA WOLFSEN,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	11
Appendix A	26
Appendix B	34

CITATIONS

Cases

Albaugh v. *Mt. Shasta Power Corp.*, 9 Cal. 2d 757, 73 P. 2d 217 — 21

Allen v. *California Water & Tel. Co.*, 29 Cal. 2d 466, 176 P. 2d 8 — 18

Bloss v. *Rahilly*, 16 Cal. 2d 70, 104 P. 2d 1049 — 16, 18, 24

City of Lodi v. *East Bay Mun. Utility Dist.*, 7 Cal. 2d 316, 60 P. 2d 439 — 15

City of Los Angeles v. *City of Glendale*, 23 Cal. 2d 68, 142 P. 2d 289 — 14

City of Pasadena v. *City of Alhambra*, 33 Cal. 2d 908, 207 P. 2d 17 — 20

Crane v. *Stevinson*, 5 Cal. 2d 387, 54 P. 2d 1100 — 14, 16, 18

Dannenbrink v. *Burger*, 23 Cal. App. 587, 138 Pac. 751 — 15

Davis v. *Gale*, 32 Cal. 26 — 19

E. C. Horst Co. v. *New Blue Point Min. Co.*, 177 Cal. 631, 171 Pac. 417 — 16, 21

Haun v. *De Vaurs*, 97 Cal. App. 2d 841, 218 P. 2d 996 — 16

Lux v. *Haggin*, 69 Cal. 255, 10 Pac. 674 — 16

MacGregor v. *State Mutual Co.*, 315 U.S. 280 — 12

Meredith v. *Winter Haven*, 320 U.S. 228 — 22

Moore v. *California Oregon Power Co.*, 22 Cal. 2d 725, 140 P. 2d 798 — 14

Page

San Luis Water Co. v. *Estrada*, 117 Cal. 168, 48 Pac. 1075 15
Scott v. *Fruit Growers' Supply Co.*, 202 Cal. 47, 258 Pac. 1095 15
Senior v. *Anderson*, 115 Cal. 496, 47 Pac. 454 15
Southern Cal. Inv. Co. v. *Wilshire*, 144 Cal. 68, 77 Pac. 767 15
Stevens v. *Oakdale Irr. Dist.*, 13 Cal. 2d 343, 90 P. 2d 58 16, 17, 18
Stevinson Water Dist. v. *Reduner*, 36 Cal. 2d 264, 223 P. 2d 209 16, 17, 18, 22
Thompson v. *Consolidated Gas Co.*, 300 U.S. 55 12
Strong v. *Baldwin*, 154 Cal. 150, 97 Pac. 178 20
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 3, 11, 12, 13, 19
West v. *A. T. & T. Co.*, 311 U.S. 223 20

Statutes

28 U.S.C. § 1255 1
28 U.S.C. § 1491 3
1933 Cal. Stat. 2643, c. 1042 23, 24
California Water Commisssion Act of 1913 24
California Water Code 22, 24

Miscellaneous

Hutchins, *The California Law of Water Rights* (1956) 12, 15, 16
Weil, *Water Rights in the Western States* (3d ed., 1911) 12, 15
Weil, *Mingling of Waters*, 29 H.L.R. 137 17
Note, 25 Cal. L.R. 124 16
Note, 28 Cal. L.R. 113 16
25 Cal. Jur., Waters, § 111 16
26 Cal. Jur., Waters, pp. 171-178 15
25 Op. Cal. Att. Gen. 8 24

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on May 7, 1958, rehearing denied, July 16, 1958.

Opinions Below

The opinion of the Court of Appeals is set forth in Appendix A to this petition and is reported at 162 F. Supp. 403. The opinion of the Commissioner of the Court of Claims, not officially reported, is set forth in Appendix B to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1255. The order of the Court of Claims, included in its

opinion as set forth in Appendix A to this petition, was entered on May 7, 1958. A motion for rehearing was overruled in an order entered on July 16, 1958.

Questions Presented

1. Whether the Central Valley Project by diverting the waters of the San Joaquin River has deprived petitioners of their riparian right to use the water of the San Joaquin River without providing petitioners with a substitute water supply of equal stability and value, where respondent has refused to contract to supply petitioners with a substitute supply of exchange water imported from the Sacramento River although such contracts have been entered into with other landowners upstream from petitioners?

2. Whether the Sacramento River water imported into the San Joaquin River by respondent pursuant to contracts with landowners located upstream from petitioners and which returns to the channels of the San Joaquin after use in irrigating the croplands of the upstream owners, is "foreign water" and thus not subject to petitioners' riparian right?

Constitutional and Statutory Provisions Involved

Fifth Amendment to the Constitution:

> "* * * nor shall private property be taken for public use, without just compensation."

Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383:

> "Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior,

in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Statement of the Case

Petitioners are the owners of some 4,250 acres of land in Merced County, California, of which about 4,040 acres are riparian to the San Joaquin River or Salt Slough (a branch channel of the San Joaquin). This action was brought in the Court of Claims, on March 22, 1955, to recover just compensation for the decrease in the market value of this land caused by the extinguishment of petitioners' riparian water rights as a result of the construction and operation by the United States of the Central Valley Project. The jurisdiction of the Court of Claims was based on 28 U.S.C. §1491.

1. *The Central Valley Project.* The history and scope of the Central Valley Project are stated in considerable detail in the Findings of Fact made by the Court of Claims and also in the opinion of Mr. Justice Jackson for this Court in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725. Generally speaking, it "is a gigantic undertaking to distribute the principal fresh-water resources of California." *Id.*, at p. 728.

The Central Valley of California reaches from Redding, in the north, to Bakersfield, in the south, and is approximately 450 miles in length. Its main water courses are the

Sacramento River, which drains the northerly two-fifths of the Valley, and the San Joaquin River, which drains the southerly three-fifths. The Sacramento River carries about twice the volume of water carried by the San Joaquin, while the San Joaquin Valley contains about twice the irrigable land found in the Sacramento Valley. Under natural conditions, consequently, there was more water available than was needed in the Sacramento end of the Central Valley and a deficiency of water in the San Joaquin end. The grand purpose of the Central Valley Project was to transfer the excess water of the Sacramento to the southern part of the Central Valley. (Fdgs. 1-6.) [1]

The Project rests principally upon Shasta and Friant Dams and a system of canals. Since August of 1951, the entire normal flow of the San Joaquin River has been impounded by Friant Dam and diverted through canals to lands that are not riparian to the San Joaquin River, and the only significant amounts of water flowing in the channel of the San Joaquin below Friant Dam originated in the Sacramento River and were transported through the Delta-Mendota Canal to the San Joaquin. (Fdgs. 7-9, 33.) Petitioners' land are located below Friant Dam, so that they have been deprived of San Joaquin River water since August of 1951 and the water now flowing past their land originated in the Sacramento River (Fdg. 43).

This Sacramento River water has been transported and introduced into the San Joaquin River by the United States pursuant to contracts with certain owners of rights in San Joaquin River water located upstream from petitioners. The Project from its beginning contemplated either the provision of a substitute supply of water or the purchase of the water rights destroyed by the impoundment and

[1] References are to the findings of fact made by the Court of Claims. Those findings, which are in the record filed with this Court, are accepted in full by petitioner for purposes of this petition.

diversion of San Joaquin River water at Friant Dam. Contracts were entered into by the United States with Miller & Lux and its affiliated companies (hereinafter inclusively referred to as Miller & Lux), the owners of the most important water rights, and also with certain other water-rights owners. In these contracts, the United States agreed to supply substitute waters from the Sacramento River in an amount roughly equivalent to the supply of water that had been available to the particular owners under their water rights for the irrigation of crop lands. Existing rights to use San Joaquin water for other purposes were purchased from these owners, and all water rights of other owners were purchased. Certain other owners have been awarded damages by the Court of Claims for the destruction of their water rights. (Fdgs. 7-17, 24-27.)

Respondent has not purchased petitioners' riparian water rights, and it has not contracted with petitioners to supply them with an equivalent supply of exchange water from the Sacramento River. Repeated offers by petitioners, while this case was in the Court of Claims, to dismiss the action if respondent would enter into such a contract with them were rejected by respondent. Petitioners are not given any rights to the exchange waters or against the United States by the contracts that have been entered into with the other landowners. In the "Amended Contract for Exchange of Waters" that the United States has signed with Miller & Lux, it agrees, in Article 13, to deliver substitute exchange water at certain designated points and that after delivery of the water, the United States "shall have no further legal interest therein, except as herein otherwise expressly provided."[1a] The contract goes on to provide in Article 24 that it shall not be construed to

[1a] This contract is in the record as Joint Exhibit M.

confer "any right whatsoever upon any person, firm or corporation not a party to this contract."

2. *Petitioners' Water Rights.* Petitioners' land was acquired, on May 10, 1940, from Cyrus J. Sheppard, and is part of a larger tract acquired by Mr. Sheppard from Miller & Lux (Fdgs. 35, 36). Approximately 4,040 of the 4,250 acres owned by petitioners enjoyed riparian rights in the use of the water flowing in the San Joaquin River and its branch channels prior to the impoundment and diversion of such water in August of 1951 (Fdg. 39). These riparian rights were subordinated, by certain reservations in the deed from Miller & Lux to Sheppard, to the water rights of Miller & Lux (Fdg. 35). During the summer months when the demand for water is heaviest, virtually the entire direct flow of the San Joaquin was applied by Miller & Lux, in the exercise of its superior water rights, in the irrigation of croplands (Fdg. 21).

Despite this use of the entire direct flow of the San Joaquin by Miller & Lux, 70 second-feet or more of San Joaquin River water normally flowed past petitioners' land during the summer months, and petitioners were assured by their riparian rights in this water of a supply of at least 35 second-feet, prior to August of 1951 (Fdgs. 41, 48).

The water thus available to petitioners is referred to in the record as "return" water. All water used in irrigation is not and cannot be consumed, so that certain portions return to the stream if applied to lands within the watershed of the stream (Fdgs. 22, 23). Under California law, this return water, if natural to the stream to which it returns (*i.e.*, if it originated within the watershed of the stream), is subject to the rights of riparians along the stream.[2] Moreover, California law prevented Miller & Lux

[2] See p. 14, *infra*, for supporting authorities.

from changing the manner or place of use of the direct natural flow of the stream in such a way as would reduce the amount of return flow available to petitioners as lower riparians, despite the superior nature of the Miller & Lux water rights.[3]

Thus, the Court of Claims expressly found, in its 48th finding of fact, that:

> "Prior to 1951, plaintiffs' lands received in Salt Slough by way of return flow a reasonably stable supply of water of the order of 70 second-feet or 4,200 acre-feet per month, or more. As riparian owners plaintiffs were entitled to use the flow reaching their lands subject only to the needs of other riparian owners, with whom the water had to be equitably divided. The extent of the division reasonably to be anticipated on the basis of possible future development of other riparian lands would not be likely to exceed an even division, giving to plaintiffs' reasonable assurance of a water supply under their riparian rights of 35 second-feet or 2,100 acre-feet per month. Such a supply would suffice for the development of 2,500 acres of plaintiffs' lands to the uses described in finding 47(c)."

In finding 47(c), the Court of Claims found that, assuming a sufficient supply of water for irrigation to be available, from 1900 to 2400 or more acres of petitioners' land, if developed, could be used for the growth of crops of various kinds, and permanent pasture could be grown on the remaining 1,500 or more riparian acres. The Court of Claims also found that these were the highest and best uses of the particular land (Fdg. 49(a)), and that development of the land to permit the growth of irrigated

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[3] See pp. 14-15, *infra*, for supporting authorities.

crops would have cost, in 1951, about $100 per acre (Fdg. 47(b)). Without the assurance of a stable supply of water of the nature found to exist prior to the diversion of the San Joaquin, it would not be economically feasible to develop petitioners' land for the growth of irrigated crops or permanent pasture (Fdg. 50), and the highest and best use of the land would be the growth of natural pasture (Fdg. 51).

Because of its disposition of the case, the Court of Claims did not make a finding as to the market value of the land in August of 1951 either with or without a stable supply of 35 second-feet or more of water for use in irrigation. The Commissioner in his Report to the Court of Claims made findings of fact identical with those made by the Court of Claims with regard to the availability of water prior to August of 1951, the highest and the best uses of the land, and the cost of development.[4] The Commissioner also found that the market value of petitioners' land before the substitution of exchange waters in August of 1951 in view of these circumstances amounted to $485,000 and that after the substitution of the exchange waters, the land was worth only $263,000, assuming that petitioners' riparian rights were extinguished by the substitution of Sacramento River water for San Joaquin River water.[5]

3. *The Ruling Below.* The contracts entered into by respondent with Miller & Lux assured that company of a better water supply than it enjoyed prior to the operation

[4] The Commissioners' findings of fact are in the record. Those referred to have the same numbers in the Commissioners' Report as in the findings made by the Court of Claims.

[5] Commissioner's Finding 59. Petitioners' excepted to this finding on the ground that the evidence showed the land to have a market value, in 1951, of $565,000 prior to the diversion of the San Joaquin and the extinguishment of petitioners' riparian rights. Petitioners did not object to the finding as to the market value of the land without a stable water supply. Respondent excepted to both findings.

of the Central Valley Project (Fdg. 27). The water has been used to irrigate croplands located upstream from petitioners, resulting in a return flow equalling or exceeding the return flow prior to the diversion of the San Joaquin. At the time of the decision by the Court of Claims, this return water continued to flow by petitioners' land. It is now composed, however, of Sacramento River water rather than San Joaquin River water. (Fdgs. 43, 49, 69.)

We show in our discussion of the reasons why this petition should be granted that, under California law, this return Sacramento River water is "foreign water" to which petitioners' riparian rights do not apply, in that the water originated outside of the watershed of the San Joaquin and is brought into that watershed by artificial means. While foreign water is subject to appropriation and petitioners have been granted a permit by the State of California to appropriate up to 50 second-feet of unappropriated water in Salt Slough, if available (Fdg. 55), this does not assure petitioners of a supply of water sufficiently stable to permit development of their land and the growth of irrigated crops.

As we shall show, the return flow of foreign water, unlike the return flow of water natural to the San Joaquin, may be reduced or terminated at any time by the producer or assignee of the foreign water.[6] Moreover, even if the return flow should be permitted to continue without interruption, none of the water may be available to petitioners. Three permits to appropriate water from Salt Slough in an amount up to a total of 94[illegible] second-feet were issued by California before petitioners' permit, and petitioners' permit was issued on the basis that these earlier appropriators have priority of right (Fdgs. 56, 57). A return flow during

[6] Petitioners were informed, subsequent to the decision by the Court of Claims, that the right to use at least part of the return flow has been sold by an affiliate of Miller & Lux, and the water thus sold will no longer be available to appropriators. See pp. 17-18, *infra*.

the summer months of more than 70 second-feet is not assured (Fdg. 48), even if permitted to continue by Miller & Lux, so that the entire amount could be taken by these prior appropriators.

The Commissioner of the Court of Claims, in his opinion, concluded that the California courts would not necessarily apply the foreign-water doctrine in the circumstances of this case because none of "the foreign water precedents relates to a situation of aspect comparable to the Central Valley Project," and that "if this case were pending before a California court, the result might go either way; and a split down the middle would be as much of a likelihood as any."[7] He also noted that the California courts have equity powers not possessed by the Court of Claims, and speculated that they might impose a physical solution or some other equitable remedy that could not be awarded by the Court of Claims.[8] The Commissioner therefore recommended that either party be given an opportunity "to seek the judgment of a California court in relation to the status of" petitioners' water rights,[9] because in his view:[10]

> "Adjudication by a California court, prior to any award of compensation by this court, is desirable as the only way to enable this court to make an accurate award. If the case goes to judgment in the Court of Claims prior to an adjudication by a California court, the judgment will not preclude a later adjudication by a California court; and in that event, plaintiffs may be deprived of rights of greater value than those of which they were compensated by the Court of Claims; or they may have been compensated for rights of which they have never been legally deprived."

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[7] Appendix B, at p. 40.

[8] Appendix B, at pp. 40-41.

[9] Appendix B, at p. 45.

[10] Appendix B, at p. 45, note 15.

The Court of Claims rejected this recommendation by its Commissioner, and proceeded to decide that petitioners' could not recover because they had not been injured by the diversion of the San Joaquin River. The apparent basis for this decision was the refusal of that Court to "accept the application of the foreign water doctrine to the exchange waters of the Sacramento flowing down the channels of the San Joaquin from Mendota pool." [11] In view of this holding, the Court concluded that a "superior right" to divert or otherwise use the return flow of Sacramento water does not exist under California law as against petitioners,[12] and petitioners therefore are assured of the continued availability of the return flow since "by contract, as well as by law, defendant is committed to supply waters to the holders of superior rights from whom plaintiffs derive their return flow." [13]

Reasons for Granting the Writ

This Court has held that in authorizing and implementing the Central Valley Project, the "Congress proceeded on the basis of full recognition of water rights having valid existence under state law," and "whether required to do so or not, Congress elected . . . . to take them under its power of eminent domain." *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 734, 739. Thus, as that case also held, where the United States fails to carry out the Congressional plan of purchasing water rights taken in the construction and operation of the Project, either by cash payments or by arrangements for a substitute supply of water, the owners of such rights are entitled to recover just compensation in the Court of Claims.

In suits brought in the Court of Claims to recover just compensation for the taking of water rights alleged to have

[11] Appendix A, p. 30.
[12] Appendix A, p. 29.
[13] Appendix A, p. 30.

valid existence under California law, the Court of Claims perforce must ascertain and apply the California law of water rights. As this Court recognized in *Gerlach*, this "peculiarly local law" can be properly interpreted "only in the light of a long history of strife and doctrinal conflict." *Id.*, at pp. 743-744. While California, unlike most other arid western states, adopted the doctrine of riparian rights, that doctrine has been modified in part by provisions for acquisition of water rights by appropriation, by an unusually short statute of limitations (five years) governing the acquisition of prescriptive rights, by a "pueblo" doctrine taken over from Mexican water law, and by a constitutional amendment adopted in 1928 limiting the exercise of riparian rights to reasonable and beneficial uses.[14]

This Court has indicated its reluctance to disturb decisions of the lower federal courts on issues governed by state laws, "particularly when that court is composed . . . wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws." *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 74-75; *MacGregor* v. *State Mutual Co.*, 315 U.S. 280, 281. The Court of Claims, however, is not composed of citizens of California, seldom is called upon to apply California law, and cannot be said to have any greater familiarity with the State or its laws than does this Court. Moreover, unlike a decision by a federal district court where one review can be obtained as a matter of right in a court of appeals, the only forum in which decisions of the Court of Claims can be reviewed and errors in the application of state laws corrected is this Court.

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[14] A concise description of the history and development of some of the more important aspects of California water law is contained in the *Gerlach* case, *id.*, at pp. 742-755. A fuller discussion may be found in a recent publication of the State of California, Hutchins, *The California Law of Water Rights* (1956). An older but still the definitive text in the field is Wiel, *Water Rights in the Western States* (3d ed., 1911).

We believe, and shall attempt to show, that the Court of Claims in this case has decided an important question of California water law in a manner that conflicts with the decisions of the California courts. Rule 19 of the Rules of this Court states that one of the reasons that will be given consideration in determining whether to grant a writ of certiorari is the decision by a lower federal court of "an important state or territorial question in a way in conflict with applicable state or territorial law." We submit that under the circumstances that reason justifies the grant of a writ of certiorari in this case.

The importance of an assured supply of water to landowners in the arid regions of California, as well as elsewhere in the West, can hardly be exaggerated. With an assured supply of water, petitioners, for example, can use their land for the most part in growing cotton, grains and other crops yielding a relatively high rate of return; without such a water supply, only natural pasture can be grown. The tremendous Central Valley Project rearranges the distribution of water resources throughout a large area of California. This has given rise to a number of problems concerning the effect of the Project on existing water rights. Some of these problems were settled by this Court in the *Gerlach Live Stock Co.* case, *supra*. Another important problem is presented here.

The existence and extent of petitioners' riparian water rights prior to the diversion of the San Joaquin River in August of 1951 were not seriously disputed by respondent below and have been found by the Court of Claims in a manner satisfactory to petitioners. These riparian rights assured petitioners, after taking into consideration the correlative rights of other riparians, of a stable supply of water sufficient in amount to permit the development of 2500 acres of petitioners' land for the raising of high-value crops. Under these circumstances, petitioners' entire 4,040 acres

of riparian land had a market value in 1951 of at least $485,000, which averages out to $120 per acre. This was so even though about $100 per acre would have to be spent in leveling and otherwise developing the land so that it would be suitable for growing crops. It also seems to be clear that the market value in 1951 of the 4,040 acres without an assured supply of water would not be more than $263,000 in all or $65 per acre—a difference in value of at least $222,000 total and $55 per acre.[15]

In the Central Valley, the demand for water to use in irrigation is highest and the available supply of water is lowest during the summer months. During those months, the only water flowing past petitioners' land, both before and after the diversion of the San Joaquin, has been so-called return water. This is water that has seeped or otherwise escaped into Salt Slough (a branch channel of the San Joaquin) after use in irrigating upstream croplands. The Court of Claims held that petitioners' riparian rights extended to this return water prior to the diversion of the San Joaquin when it was composed of water natural to that River.[16] This holding clearly accords with California law. *City of Los Angeles* v. *City of Glendale*, 23 Cal. 2d 68, 142 P. 2d 289; *Moore* v. *California Oregon Power Co.*, 22 Cal. 2d 725, 140 P. 2d 798; *Crane* v. *Stevinson*, 5 Cal. 2d 387, 54 P. 2d 1100.

Petitioners' riparian rights were subordinate, both by deed reservation and by judicial decree, to appropriative and prescriptive water rights owned by Miller & Lux and its affiliated canal companies located upstream from petitioners' land. The scope of these superior upstream water

[15] These were the findings of the Commissioner of the Court of Claims. See footnote 5, *supra*, and accompanying text.

[16] While a footnote to the opinion, Appendix A at p. 31, seems to suggest some doubt in the mind of the Court about this, the court in its opinion at least assumes that petitioners had such riparian rights and its 48th finding of fact expressly finds the existence of a riparian right to the return flow of San Joaquin water assuring petitioners of at least 35 second-feet of such water.

rights was limited, however, by California law. In particular, the manner or character of the use of the water under the appropriative and prescriptive rights, and the point of diversion of the water from the stream, could not be changed to the injury of downstream riparians or appropriators. *City of Lodi* v. *East Bay Mun. Utility Dist.*, 7 Cal. 2d 316, 340, 60 P. 2d 439, 450; *San Luis Water Co.* v. *Estrada*, 117 Cal. 168, 183-184, 48 Pac. 1075, 1080; *Senior* v. *Anderson*, 115 Cal. 496, 47 Pac. 454; 26 Cal. Jur., Waters, at pp. 171-178 and cases cited.

Thus, an upstream appropriator or holder of prescriptive rights cannot change the place of use or the nature of the use to which he puts the water, *Southern Cal. Inv. Co.* v. *Wilshire*, 144 Cal. 68, 77 Pac. 767, or sell it to others, *Scott* v. *Fruit Growers' Supply Co.*, 202 Cal. 47, 258 Pac. 1095, or tighten his drainage ditches, dams, etc., *Dannenbrink* v. *Burger*, 23 Cal. App. 587, 138 Pac. 751, when the effect of such actions is to reduce the supply of return water available to downstream riparians. See Weil, *op. cit. supra*, at pp. 60-61; Hutchins, *op. cit. supra*, at p. 392. The upstream landowners must either continue to use the water in a manner that will not reduce the amount returning to the stream or else permit the waters of the stream to flow directly down to the lower riparians without interference. It was these limitations on the scope and exercise of the upstream water rights that assured petitioners of a stable supply of return water during the summer months despite the subordinate nature of their riparian rights.

Petitioners' view that after the diversion of the San Joaquin in August of 1951 they have not been assured of a supply of water sufficiently stable to permit the development and irrigation of their land for the growth of crops, despite the continued flow of return water by their land, is based on another firmly settled doctrine of California water law. Since that time, the only significant amounts of water flowing in the San Joaquin, including return water,

originated in the Sacramento River and was transported to the San Joaquin through artificial means by the Central Valley Project.

In *E. C. Horst Co.* v. *New Blue Point Min. Co.*, 177 Cal. 631, 634-635, 171 Pac. 417, 418, the Supreme Court of California considered the following question:

> "Where the flow of a natural stream is augmented by artificial means, that is, by waters which, without the intervention of human agency, would never reach the stream, does this artificial flow inure to the benefit of riparian owners or is it merely in the nature of abandoned personalty which may be appropriated by the first person who can take it from the stream?"

After reviewing the pertinent cases in California and other jurisdictions, including England, the Court concluded that riparian rights apply only to natural waters,[17] and that as the waters in question "would not in the course of nature reach appellant's lands, that corporation may not complain of being deprived thereof either by the producers of the excess, by their assignees, or by a stranger to their title who appropriated the abandoned excess for proper purposes." 177 Cal., at p. 638, 171 Pac., at pp. 419-420.

This ruling in the *Horst* case has been followed without deviation by the California courts ever since. *Stevinson Water Dist.* v. *Hoduner*, 36 Cal. 2d 264, 223 P. 2d 209; *Bloss* v. *Rahilly*, 16 Cal. 2d 70, 104 P. 2d 1049; *Stevens* v. *Oakdale Irr. Dist.*, 13 Cal. 2d 343, 90 P. 2d 58; *Crane* v. *Stevinson, supra; Haun* v. *De Vaurs*, 97 Cal. App. 2d 841, 218 P. 2d 996; 25 Cal. Jur., Waters, § 111. See, also, Hutchins, *op. cit. supra*, at pp. 69-70, 211-212, 393-401; Note, 28 Cal. L. R. 113; Note, 25 Cal. L. R. 124, where this rule is recognized

[17] The landmark case establishing the riparian doctrine in California, *Lux* v. *Haggin*, 69 Cal. 255, 350, 10 Pac. 674, 753, stated that riparian rights extend to the *"natural and usual"* flow of a stream.

and discussed. The producer or assignee of foreign water may intercept the return flow and apply it to his land (*Stevens* v. *Oakdale Irr. Dist.*, *supra*), or sell it (*Stevinson Water Dist.* v. *Roduner*, *supra*), or otherwise dispose of the water without regard to downstream users, whether riparian landowners or appropriators.[18]

It is not entirely clear whether, under California law, the "producer" of the Sacramento River water now flowing in the San Joaquin is Miller & Lux or the United States. But whether Miller & Lux be considered the producer of the water or merely the assignee of the United States, it seems clear that under the decisions of the *Horst* and subsequent cases Miller & Lux can diminish or stop the flow of return Sacramento River water past petitioners' land at any time if the foreign-water doctrine is applicable. Indeed, petitioners were informed subsequent to the decision by the

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[18] No California case to our knowledge has ever made an exception to this freedom of producers and assignees of foreign water to diminish or eliminate the flow of such water in the stream. The *Stevens* case, *supra*, is the only one to even suggest that there may be exceptions. There is dicta in that case that: "The rule may have exceptions, as perhaps where the artificial condition has become inherently permanent and there has been a dedication to a public use, or where the drainage is stopped wantonly to harm a lower party, without other object." 13 Cal. 2d, at p. 352, 90 P.2d, at p. 62. The same possible exceptions are mentioned in Weil, *Mingling of Waters*, 29 H.L.R. 137, 142-144, where considerable doubt is expressed as to their existence. The Court of Claims did not rely on any such exceptions, and even if they exist petitioners' will not be assured of a stable supply of water. They would still be threatened by a non-malicious disposition of the waters by Miller & Lux, and its contract with respondent provides that it shall not be construed to confer "any right whatsoever upon any person, firm or corporation not a party to this contract." Moreover, even if Miller & Lux could be compelled to continue the flow of return water, as foreign water it is subject only to appropriation and not to petitioners' riparian rights. As we show, pp. 18-19, *infra*, the appropriation made by petitioners is subject to the prior rights of earlier appropriators to take an amount of water exceeding the usual return flow in Salt Slough during the summer months, and thus does not assure petitioners of a right to use any of the water even if otherwise available.

Court of Claims in this case that the San Luis Canal Company, one of the affiliated companies party to the exchange contract with respondent, arranged, on March 24, 1958, for the sale of as much as 100 cubic feet per second of such return water, much of which would otherwise have flowed by petitioners' land.[19] The fact that respondent "is committed to supply waters to the holders of superior rights from whom [petitioners] derive their return flow"[20] does not, therefore, suffice to assure petitioners that that return flow will continue, unless, contrary to the California cases cited above, petitioners have riparian rights in such return flow.

While the California cases unanimously hold that riparian rights do not attach to foreign waters, including the return flow from such waters, they also hold that foreign water is subject to appropriation subject to the contingency that the flow may be reduced or discontinued at any time by the producer or his assignee. *Stevinson Water Dist.* v. *Roduner*, *supra*; *Bloss* v. *Rahilly*, *supra*. But, "although the fact that the producer may discontinue the foreign supply does not preclude others from acquiring a right to it, when and if it exists, such fact does affect the value of the right so acquired, in that permanency is not assured." *Stevens* v. *Oakdale Irr. Dist.*, *supra*, 13 Cal. 2d, at p. 348, 90 P. 2d, at p. 61. Accord, *Allen* v. *California Water & Tel. Co.*, 29 Cal. 2d 466, 482, 176 P. 2d 8, 11; *Crane* v. *Stevinson*, *supra*. Petitioners have a permit to appropriate up to 50 second-feet of unappropriated water in Salt Slough, but that permit was issued on the basis of priority of rights in three earlier appropriators of a total amount (94.9 second-feet) exceed-

[19] This sale was brought to the attention of the Court of Claims in petitioners' Motion for Clarification of Opinion or, in the Alternative, for Rehearing. An affidavit setting forth the facts then available to petitioners is attached as Appendix A to petitioners' Memorandum to the Court of Claims in support of that motion.

[20] Appendix A, at p. 30.

ing the usual flow (70 second-feet) in Salt Slough during the summer months.[21] Thus, petitioners' are not assured of a stable water supply as appropriators if the foreign-water doctrine is applicable.

The Court of Claims, however, flatly rejected the application of the California foreign-water doctrine to the Sacramento River waters now flowing in the San Joaquin, and thus held that petitioners have not been injured by the diversion of the San Joaquin. The Court stated (Appendix A, at p. 30) that:

> "The facts in the California cases cited in support of this foreign waters doctrine are not parallel to those in the instant case. In none of them was there a complete diversion of the natural waters of a stream accompanied by a guaranteed substitution of an equal amount of other waters.
>
> "In the absence of a specific ruling by a California court, we cannot accept the application of the foreign water doctrine to the exchange waters of the Sacramento flowing down the channels of the San Joaquin from Mendota pool. . . .
>
> "If, on the facts of the case, the return flow of irrigation water in Salt Slough remains unimpaired in

[21] Although the three other appropriators applied for and obtained their permits before petitioners, petitioners made the first application after the diversion of the San Joaquin and the introduction of Sacramento River water in August of 1951. The Court of Claims noted this fact, but did not decide whether it had any significance under California law, apparently because of its decision that the foreign-water doctrine is inapplicable altogether. See Edgs. 55-57, and particularly footnote 49. While California law is not completely clear on this, an old case, *Davis* v. *Gale*, 32 Cal. 26, 35, as well as the action of the administrative agency in issuing petitioners' permit, indicates that the priority of the three earlier appropriators would not be affected. California law is clear that petitioners' right to use the water would not be affected by the permits issued to the three downstream appropriators if the water were subject to riparian rights, so long as the use of the water is reasonable and beneficial. See *United States* v. *Gerlach Live Stock Co., supra.*

quality and undiminished in quantity and there is no foreseeable prospect of change in that situation as long as the economy of the region continues to obtain; and if, by contract, as well as by law, defendant is committed to supply waters to the holders of superior rights from whom plaintiffs derive their return flow, how can they have been damaged?"

It is quite clear how petitioners have been damaged if the Court of Claims erred in holding the foreign-water doctrine inapplicable and if the obligation to supply substitute water recognized by respondent runs only to Miller and Lux and the other landowners with which respondent has contracted to supply such water. As we have shown, Miller & Lux could terminate the flow of return water at any time and even if the flow should continue, petitioners' have only appropriative rights to its use which rights are subject to prior appropriations exceeding in amount the entire available supply.[22] In order to use the water to irrigate crops, and thus place the land to its highest and best use, petitioners' in 1951 would have had to expend $100 per acre, or $250,000 in all, to clear and level the land so that crops could be grown. The cost would undoubtedly be considerably greater today. Uncontradicted testimony in the record establishes that this huge expense is not feasible unless a satisfactory future water supply is assured (Tr. 285-286, 289-291, 444, 449), and thus could not be undertaken if the water supply, even if now available, is subject to these contingencies. In

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[22] The interpretation given by the Court of Claims to California law of course is not binding on the California courts. *West* v. *A.T. & T. Co.*, 311 U.S. 223, 237-238. And, since neither Miller & Lux nor the downstream appropriators are parties to this case, they are not bound by the decision of the Court of Claims and are free to assert their rights in the California courts. *City of Pasadena* v. *City of Alhambra*, 33 Cal. 2d 908, 920, 207 P. 2d 17, 25; *Strong* v. *Baldwin*, 154 Cal. 150, 163, 97 Pac. 178, 183.

such circumstances, as testified, the market value of the land is that of "dry" land suitable only for the growth of natural pasture. See *Albaugh* v. *Mt. Shasta Power Corp.*, 9 Cal. 2d 757, 73 P. 2d 217, where damages for the taking of riparian rights were measured by the difference between the market value of the land with water and its market value without water, although at the time a plentiful supply of water was available, because the permanence of that supply was not assured.

Petitioners, on a number of occasions, have offered to accept a contractual commitment from respondent to supply them with a substitute amount of water equal to the 35 second-feet or better which they had prior to the diversion of the San Joaquin, and are willing to accept such a commitment now. Until that is done, however, the ruling of the Court of Claims that the foreign-water doctrine does not apply is crucial to its holding that petitioners' have not been damaged. That holding, we believe, has no rational basis and constitutes plain error.

The Court of Claims did not cite one authority for its view, even by analogy, and insofar as we are aware none exists. The sole criterion stated in the California cases for determining whether the foreign-water doctrine applies is whether the water is natural to the stream or is introduced into the stream by a human agency through artificial means. Since the decision in the *Horst* case, as we have shown, every case in which the issue has risen has held that if the water is natural to the stream the riparian doctrine applies, but if it were introduced through artificial means the foreign-water doctrine applies. That distinction was thought by the California courts to be inherent in the very nature of the riparian right in that it has traditionally been held to apply only to the usual and natural flow of the stream. We have cited a leading textbook and some law review notes in which the distinction made in the California cases is ac-

cepted without reservation, and we do not know of any such secondary authorities expressing the view that the nature of the Central Valley Project or any other reason might cause a different result to be reached.

We recognize, of course, that none of the California cases deals specifically with the exchange of Sacramento water for San Joaquin water here in issue, and that the Central Valley Project is unique in size and in some of its features. It is rare, however, that a case in the federal courts involving an application of state law presents a factual situation identical with a case involving the same issue in the courts of that state. But that does not relieve the federal courts from the obligation of ascertaining and applying the principles underlying the state decisions, "unless it can be said with some assurance that the [State] Supreme Court will not follow them in the future." *Meredith v. Winter Haven*, 320 U.S. 228, 234. There is no basis for such assurance here. The differences between this case and the California cases applying the foreign-water doctrine are matters of detail and not of substance. In *Stevinson Water Dist.* v. *Roduner*, *supra*, for instance, the only water flowing in the stream during the summer months was return water brought by artificial means into the watershed of the stream from another stream, and the continued release of this foreign return water was provided for by a long-term contract that had been in effect for some 25 years when the case was decided.

While the California courts have not specifically considered the status of Sacramento River water brought into the San Joaquin by the Central Valley Project, this has been done by the California administrative agency primarily responsible for the interpretation and enforcement of the California Water Code.[23] This was done, moreover, with respect to petitioners' water rights in issue here. A report

[23] See, *e.g.*, California water Code, §§ 22, 23, 200-203, 1050.5, 11150.

by the Division of Water Resources, Department of Public Works, signed by its Supervising Hydraulic Engineer and its Senior Attorney, stated that:

> "A lengthy * * * study of the * * * water rights is not considered justified because, in our opinion, riparian status of the Wolfsen lands would not entitle the owners thereof to divert water from Salt Slough other than natural flow.
>
> "The operational spill by the canal company and return flow from lands served by the company constitute foreign water and not natural flow, being water imported into the drainage area by artificial means.
>
> "Foreign water does not inure to the riparian owners but is subject to appropriation under the procedure provided in the Water Code."

The report concluded that petitioners could be prevented by appropriate legal action from pumping the return Sacramento River water from Salt Slough "under the claim that it is being done in the exercise of riparian rights."[24] If there were any doubts that the California courts would apply the foreign-water doctrine to the return waters in question, this square administrative ruling should settle the matter.

The Court of Claims attempted to support its holding that the foreign-water doctrine does not apply by implication from a California statute (1933 Cal. Stat. 2643, c. 1042) usually referred to as the Watershed-of-Origin Act. While the statute does provide that "no right to the use of water shall be gained or lost by reason of any . . . exchange" of waters between watersheds, it has been construed, as the Court of Claims conceded, to protect only the owners of water rights in the watershed where the exchange waters

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[24] Excerpts from the report, including those quoted, are set out in Finding 58 made by the Court of Claims.

originated (here the Sacramento) and not the owners of water rights in the watershed to which the exchange waters are transported (here in San Joaquin).[25] This limitation would seem to imply that the California legislature did not intend to confer any additional rights on this latter class of landowners—else it would have done so expressly—rather than the contrary implication found by the Court of Claims. Certainly, the statute does not purport to change the established California doctrine that riparian rights apply only to natural waters and not to water brought into the watershed by artificial means.

A California statute giving a much clearer indication of the public policy of the State in this regard is the Water Commission Act of 1913, which is the basis for the present California Water Code. The California Supreme Court stated in *Bloss* v. *Rahilly*, supra, 16 Cal. 2d, at pp. 75-76, 104 P. 2d, at p. 1051, that the Water Commission Act does not purport:

> "... to enlarge the rights of riparian owners as such or to curtail the rights of appropriators. On the contrary, the language employed in the act shows an intention to declare the waters of the state to be subject to appropriation in so far as that can be done without interfering with vested rights. ... [I]t constitutes no more than an affirmation of the existing rights of riparian owners in and to the natural flow and it may not be construed as enlarging the rights of riparian owners so as to give them in effect riparian rights in foreign water as well as in the natural flow."

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[25] The Watershed-of-Origin Act was not made applicable to federal projects until September 22, 1951, after the taking of petitioners' water rights, when section 11128 of the California Water Code became effective. The constitutionality of applying the Act to federal projects is exceedingly doubtful, see 25 Op. Cal. Att. Gen. 8, 26, and the Bureau of Reclamation has refused to recognize its applicability to such projects.

We submit, therefore, that the ruling of the Court of Claims that the foreign-water doctrine is inapplicable to the Sacramento River water brought into the San Joaquin by artificial means pursuant to the Central Valley Project is without any rational basis and should not be permitted to stand by this Court. The Court of Claims has decided "an important state . . . question in a way in conflict with applicable state . . . law." For these reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

Plaintiffs are the owners of certain tracts of land in Merced County, California, most of which are riparian to Salt Slough, which is a branch channel of the San Joaquin River. They allege that they have been deprived of their water rights by the construction and operation by the defendant of the Central Valley Project in California. They sue for just compensation.

The physical characteristics of the San Joaquin River, its watershed and drainage basin, the historic development of the San Joaquin Valley, and the origin, construction, and operation of the Central Valley Project (including the operation of Friant Dam prior to integrated operation of the Central Valley Project) are fully set forth in our findings of fact. Findings and summaries of many of the same facts have been made in earlier cases before this court. *Gerlach Live Stock Company* v. *United States*, 111 C. Cls. 1 (1948), affirmed 339 U.S. 725; *James J. Stevinson* v. *United States*, 111 C. Cls. 89 (1948); *East Side Canal Company, et al.* v. *United States*, 111 C. Cls. 125 (1948).

Plaintiffs acquired their property in 1940 from one Sheppard who had acquired it from Miller & Lux in 1933. Both deeds (Miller & Lux to Sheppard and Sheppard to plaintiffs) contained reservations of water rights in the nature of covenants running with the land. The text of these reservations appears in finding 35.

The reservations made the riparian rights of the land conveyed subordinate to the water rights of the grantor, whether riparian, appropriative, or prescriptive. Plaintiffs' riparian rights were not extinguished, but the covenants were to act as an estoppel in favor of the grantor to the extent of the reservations.

In prior years Miller & Lux and its subsidiary and affiliated companies had built a series of irrigation works upstream from plaintiffs' lands. By virtue of litigation con-

cluded before the conveyance to Sheppard, the appropriations of Miller & Lux and their affiliates had been validated by court decrees. The rights of both Sheppard and the plaintiffs were therefore subordinate to these appropriative and prescriptive rights.

The owners of the prior appropriative and prescriptive rights were entitled to use in one year a maximum of 1,428,074 acre-feet of water. Actually, their highest diversion during the years 1932-1951 was 1,027,180 acre-feet, and the average of their annual diversions during the same period was 870,834 acre-feet. While the flow of the river varied widely from year to year, it usually exceeded the volume of the possible maximum demand. Consequently, there was usually some excess over the water the prior appropriators had any right to demand, and almost always an excess over the actual use of the prior appropriators.

The flow of the river in its natural state has been defined (finding 5) in terms of low, high, and flood stages. During the flood stages of winter and spring the river overflowed even the high channel banks to spread over the upland area. During the river's high stages, but below flood stage, the water was confined to the banks of the high channel. A distinguishable sandy channel marked the flow of the river during its lowest stages. These stages of the river's flow continued to be factors in the diversion and use of the water after the construction of canals and irrigation works by Miller & Lux and others and until the completion of Friant Dam in 1947.

Prior to the construction of Friant Dam, therefore, water from the San Joaquin River reached the lands of plaintiffs in three ways: (1) through the overflow channel, when some of the lands were submerged by flood waters; (2) through the surface flow of water into the sloughs as part of the high channel of the river during its higher, but not flood stages; and (3) through the underground flow of the alluvial cone, some of which surfaced into and flowed through Salt Slough. At all times material here the only water in Salt Slough during the crucial summer months was return flow of irrigation water that had been distributed to lands upstream during the crop season.

Plaintiffs are not now demanding compensation for loss of either the overflow or the surface flow, as above defined. Their lands were wholly deprived of the overflow in 1947, when Friant Dam was placed in operation. The surface flows were interrupted by the construction of the dam as early as 1944. When the dam was completed, the surface flows, although not stopped entirely until 1951, became dependent upon the timing and quantity of releases by defendant from Friant Reservoir. Ten years elapsed between the completion of Friant Dam and the filing of this action.

Plaintiffs' claims in this action are for the alleged loss, in 1951, of rights in the return flow of irrigation water.

This flow was never stopped. On the contrary, its volume and dependability were enhanced by defendant's substitution in 1951 of the waters of the Sacramento River for San Joaquin waters.

Up to 1951 plaintiffs continued to receive waters from the San Joaquin River. The year 1951 marked the completion of the Delta-Mendota Canal and the beginning of the integrated operation of the Central Valley Project. Whereas Friant Dam had been placed in operation in 1947, and was thereafter used to store waters in Friant Reservoir and to control releases of flows down the San Joaquin River, the integrated operation of the Central Valley Project had to await completion of the Delta-Mendota Canal and its auxiliary pumping stations, so that water from the Sacramento River could be introduced into Mendota pool to substitute for water from the San Joaquin River, which was thereafter directed to other uses. As a consequence of the substitution, the return flow in Salt Slough after August 1951 consisted of water from the Sacramento River rather than water from the San Joaquin River.

It is this deprivation of San Joaquin water of which plaintiffs complain. Their contention is that their riparian rights depended on San Joaquin water; that the substitution of exchange waters extinguished their riparian rights; and that without such rights, the potential use of their lands was reduced from wet (irrigated farming) to dry (native pasture), with consequent loss of value.

In anticipation of the eventual substitution of waters, de-

fendant, in 1939, had entered into an agreement with Miller & Lux and its subsidiaries providing in detail, first, for the release of water from Friant Reservoir, after the Friant Dam had been completed and until the delivery of substitute water through the Delta-Mendota Canal when that system would become operative, and for continued delivery of this substitute water thereafter. This contract granted defendant the right to continue to store, divert, dispose of and otherwise use the San Joaquin waters theretofore reserved so long as substitute water is delivered in conformity with the contract.

Defendant has faithfully and fully delivered the substitute waters. In fact, the parties have by stipulation agreed that "the supply of substitute water guaranteed to Miller & Lux and its affiliated companies under the exchange contract is far better than the supply * * * prior to the construction of the Central Valley Project."

The parties have further agreed by stipulation that "so long as the great area of cropland lying generally to the southeast of plaintiffs' land continues to be irrigated, it is virtually certain that the flows in Salt Slough, [which is upstream from plaintiffs' land] during the irrigation season, will be of the same order of magnitude * * *" as previously. Consequently, there is no foreseeable prospect of loss by plaintiffs of the physical supply of water, unless, under superior right, the return flow can be diverted or required for other uses.

No such superior right has been asserted against plaintiffs. None has been established under California law. We believe none exists. We conclude, therefore, that plaintiffs are not entitled to recover. On the basis of the evidence in the case and the California cases cited, nothing of substance has been taken from plaintiffs.

Plaintiffs rest their case on the thesis that, whereas they had riparian rights as long as the water came from the San Joaquin River, water from the Sacramento River was foreign water; and under California law, they say, he who discharges foreign waters into a stream may take them away with impunity.

The facts in the California cases cited in support of this foreign waters doctrine are not parallel to those in the instant case. In none of them was there a complete diversion of the natural waters of a stream accompanied by a guaranteed substitution of an equal amount of other waters.

In the absence of a specific ruling by a California court, we cannot accept the application of the foreign water doctrine to the exchange waters of the Sacramento flowing down the channels of the San Joaquin from Mendota pool. These waters of the Sacramento were substituted in consideration of the diversion of the San Joaquin waters. Their substitution was a part of the whole plan proposed by the Secretary of Interior and approved by the President and authorized by Congress. The diversion of San Joaquin waters was authorized only because of the commitment to substitute water from the Sacramento River. We do not believe that the United States could, with impunity, take away the substituted waters.

If, on the facts of the case, the return flow of irrigation water in Salt Slough remains unimpaired in quality and undiminished in quantity and there is no foreseeable prospect of change in that situation as long as the economy of the region continues to obtain; and if, by contract, as well as by law, defendant is committed to supply waters to the holders of superior rights from whom plaintiffs derive their return flow, how can they have been damaged?

The trial commissioner of this court, to whom this case was referred for trial, submitted a recommendation for conclusions of law with his report of the facts. In an opinion in support of his recommendation he reasoned that plaintiffs had shown a right to recover because of impairment of the status of their riparian rights, in that "no case has been cited (or found) in which rights in water other than the natural flow have been declared to be riparian." While he questioned whether "plaintiffs, riparians yesterday, are trespassers today, simply because the substitution of waters had the effect of removing one of the traditional ingredients of the legal concept of riparian," he would have given plaintiffs the opportunity to prove, if they could, a diminution of the market value of their lands as a result of this technical impairment.

Plaintiffs are not entitled to compensation for a legal technicality. They must first show that something of substance has been taken from them. Plaintiffs themselves concede as much in their exceptions to the trial commissioner's recommendation. They decline the opportunity the commissioner's solution would have afforded them, to try to prove actual, as distinguished from nominal damages as a result of the substitution of waters. They insist (1) that their riparian rights have been extinguished, and (2) that the measure of compensation is not the diminution in market value resulting from the substitution, but the difference in value between the lands wet and the lands dry.

If they had riparian rights in the return flow,* and if those rights were extinguished by the substitution of waters, they have, instead, the obligation of the United States to substitute an equal amount of water from the Sacramento. Neither right is superior to the other.

The conclusion follows, as suggested by the trial commissioner, that any impairment there may have been of plaintiffs' rights amounted at most to a technicality. There is no actual damage as a result of the deprivation of the San Joaquin waters and the substitution of the Sacramento waters.

The foregoing analysis is the intention and the obligation derived from the statutes of California and of the United States to prevent such a loss as plaintiffs now claim, through the preservation as far as possible of existing water rights in the course of executing the Central Valley Project.

Before the Central Valley Project was authorized as an undertaking by the United States, a California statute (1933 Cal. Stat. 2643, c. 1042) contemplating the project as a State undertaking provided:

> In the construction and operation by the authority of any project under the provisions of this act, no exchange

* Plaintiffs have cited no case upholding their claim to riparian rights in water which was not only subject to superior rights but had actually been used to satisfy those rights and remained subject to future curtailment or elimination in the exercise of those rights. If the California courts recognize such a modification of riparianism as is inherent in plaintiffs' claim, they may, when called upon to do so, take the next step and extend riparian rights to the exchange waters.

> of the waters of any watershed or area for the waters of any other watershed or area may be made by authority unless the water requirements of the watershed or area wherein such exchange is made are first and at all times met and satisfied to the extent that such requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange thereof.

Inasmuch as the project was ultimately executed by the Federal rather than the State Government, no occasion has arisen for interpretation of the statute by the California courts. As recently as 1955, however, the Attorney General of the State made an analysis of the statute in which he concluded that the application of the section quoted was limited to the watershed-of-origin of the exchange waters, since the section was part of an act for the protection of watersheds-of-origin. The limited application suggested by the Attorney General would not, however, detract from the manifest intention of the legislature to provide that "no right to the use of water shall be gained or lost by reason of any * * * exchange thereof."

The Central Valley Project was taken over and executed by the United States under the Reclamation Act of 1902, as amended, 32 Stat. 388. The adoption of the project as a Federal undertaking began with approval by the President of the Feasibility Report by the Secretary of the Interior. Substantial portions of this report (submitted November 26, 1935, and approved December 2, 1935) are set forth in finding 59. Following a description of the general outlines of the project, and a specific reference to the plan to convey Sacramento water up the San Joaquin, the report said:

> * * * This water [referring to water from the Sacramento] will replace San Joaquin River water *now used for irrigation* in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir * * * and to be utilized in the southern San Joaquin Valley where local supplies are deficient. * * * [Italics supplied.]

In every year from 1936 to 1949 the Congress made appropriations for carrying out the Central Valley Project. The project was specifically reauthorized by two of these appropriation acts. (The Act of August 26, 1937, 50 Stat. 844, 850; and the Act of October 17, 1940, 54 Stat. 1198, 1200.)

It is apparent from the foregoing that the President has approved and the Congress has confirmed the commitment by the United States to the obligation to replace the waters of the San Joaquin River with waters from the Sacramento River, and with specific reference to the area of plaintiffs' lands (the northern San Joaquin Valley), which, prior to 1951, was receiving San Joaquin water "now used for irrigation."

The United States cannot withdraw from the commitment with impunity, and neither can it, with impunity, withdraw from any users such as plaintiffs the waters now supplied in substitution for waters formerly originating in the San Joaquin wastershed. Any future withdrawal of such waters would render the United States liable to respond with just compensation as fully as defendant would have been responsible to so respond, if it had taken away the natural waters without making an equivalent substitution therefor.

There has been no taking of plaintiffs' rights for which just compensation has not been made.

Plaintiffs' petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

APPENDIX B

Opinion of Commissioner [1]

Plaintiffs seek compensation for water rights alleged to have been extinguished by defendant's operation of the Central Valley Project in California.

Defendant pleaded the statute of limitations as one of its defenses. In its brief, however, no mention is made of this defense as being applicable to that portion of plaintiffs' claim relating to the return flow of irrigation water in Salt Slough, which represents the essence of the case. Apparently, in respect of this phase of the claim, defendant acquiesces in plaintiffs' position that the action was timely filed, within the holding of *United States* v. *Dickinson*, 331 U. S. 745 (1947). The facts sustain plaintiffs' contention in this regard.[2] Their case rests on the alleged extinguishment of riparian rights in return flow waters of the San Joaquin River. The fact is undisputed that plaintiffs' lands were not deprived of the return flow of San Joaquin water until August 1951. The petition was filed in March 1955.

At the trial, when plaintiffs had completed the presentation of their evidence, defendant moved for dismissal of the action pursuant to Rule 49 (c). The motion was overruled, but on condition that defendant might ask for reconsidera-

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[1] Under the practice generally followed in complying with orders issued pursuant to Rule 45 (c), the commissioner's opinion has been sufficiently comprehensive for the court to adopt it *per curiam*, in the absence of exceptions, or, after argument, if the court sustains the commissioner's conclusion. The present opinion represents a considered departure from that practice. Instead of undertaking a comprehensive analysis of the facts and the law, the effort has been to confine the legal analysis to a bare-bones explanation of the reasoning on which the recommended conclusion rests, and to insert in the body of the opinion an outline of the considerations which, in the view of the writer, make this case unusual in Court of Claims litigation and warrant treatment accordingly.

[2] Defendant urged the limitations defense in relation to overflow water, of which plaintiffs were deprived in 1947 or earlier. On the facts of the case the question of divisibility (deprivation of overflow in 1947 and of return flow in 1951) is not reached, since the highest and best use of the lands was for irrigated farming rather than native pasture.

tion of the ruling in its requested findings and brief.[3] Reconsideration has been so asked. Inasmuch as the conclusion is that, upon the facts and the law, plaintiffs have shown *a* right to recover, the motion to dismiss is now overruled unconditionally, and on the merits.

Prior to the construction of Friant Dam the waters of the San Joaquin River reached the lands of plaintiffs in three ways, depending on the season and the flow of the river. When the river was in flood stage, some of the plaintiffs' lands were inundated by the overflow, which of course included the surface flow in the various sloughs. When the river was in its higher (but not flood) stages, surface water flowed in the sloughs. At lower stages, and during the critical *months of irrigation, water used for irrigation upstream* from plaintiffs' lands found its way through the aquifers of the alluvial cone into Salt Slough (one of the larger sloughs) to which plaintiffs' lands were riparian.

Overflow, in terms of flooding, was brought under control during the construction of Friant Dam, and was stopped entirely when the dam was put into full operation, sometime in 1947. The surface and return flows, however, were continued until the completion of the Delta-Mendota Canal, in August 1951. Thereupon, in conformity with the plan for the integrated operation of the Central Valley Project, the controls of Friant Dam were used to limit the release of San Joaquin water to the quantity needed to supply the demands from Friant to Mendota, and water from the Sacramento River was introduced into Mendota Pool to replace the San Joaquin water therefore used below Mendota.

As a consequence, the return flow in Salt Slough after August 1951 consisted of water from the Sacramento River rather than water from the San Joaquin River.

It is this deprivation of San Joaquin water of which plaintiffs complain. Their contention is that their riparian rights depended on San Joaquin water; that the substitution of exchange waters extinguished their riparian rights;

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[3] Trial was held in San Francisco. Reasonable application of Rule 49 (c) suggested the propriety, under the circumstances of this case, of requiring defendant to proceed with its evidence on the merits, rather than to interrupt the trial while the motion was under consideration.

and that without such rights, the potential of their lands was reduced from wet (irrigated farming) to dry (native pasture), with consequent loss of value.

Plaintiffs' legal reasoning may be summarized as follows: that riparian rights are founded and dependent upon the natural flow of the stream, in the sense of the water being that which originates in the watershed of the stream; that water originating elsewhere, even when introduced into the otherwise dry channel of a stream to which lands are riparian, is foreign water; that the substitution of foreign water for the natural flow extinguishes the riparian rights; that the principal owner of rights in foreign water is the person who introduced it; that such owner may control the flow, stop it, sell it, or give it away for use on lands riparian or nonriparian to the stream; that although the flow is subject to appropriation while it lasts, all appropriations are subject to the paramount right of the producer of the flow; and that, even while the flow in Salt Slough lasts, plaintiffs' license to appropriate from it is subordinate to the permits of three prior licensees whose combined call upon the flow is sufficient to exhaust the supply normally to be expected.

Defendant denies that the substitution of exchange waters had any such legal effect as that which plaintiffs attribute to it. Defendant contends that plaintiffs' lands were riparian to Salt Slough after, as well as before, the substitution; that a California statute specifically provides that no loss of rights should result from the substitution; that between the reservation in the deed from Miller & Lux and the contract for the exchange of waters, defendant acquired a right to substitute waters, as to the exercise of which plaintiffs cannot complain as long as the substitute waters are delivered; that plaintiffs have had the benefit of what is known in California case-law as a physical solution; and that there has been no diminution of value in plaintiffs' lands because of the substitution.

Three of the defendant's contentions require little discussion. For one thing, the conclusion is not warranted, on the evidence in this record, that the value of plaintiffs' land was not diminished by the substitution. Secondly, the California statute on which defendant relies relates to the rights of watersheds-of-origin, and cannot properly be construed

to apply to the rights of individual landowners.[4] Finally, the contention relating to the effect of the reservation in the deed and the agreement for the exchange of waters fails for lack of substantiating facts.[5]

The two remaining contentions of defendant, that plaintiffs have not lost their riparian rights, and that they have had the benefit of a physical solution, really amount to one and the same thing, namely, that plaintiffs now have (in physical flow) as much water as they ever had (perhaps more) and that they have as much right to use it as they ever had.

In contending that plaintiffs have not lost their riparian rights, defendant is in effect asserting that a rose by any other *name et cetera*. There is no denial that the phrase, riparian rights, connotes rights in water originating as the natural flow of the stream. No case has been cited (or found) in which rights in water other than the natural flow have been declared to be riparian. There are, however, many references in the California cases to "the flow of the stream or its equivalent." If, as defendant contends, plaintiffs had as much right (to as much water) after the substitution as they had before, it would be because of the equivalent flow and an adjudication in the nature of a physical solution of their right to use it.

The evidence establishes the equivalent flow as a fact, and the parties agree that no adjudication in the nature of a physical solution, assuring plaintiffs of the right to use the equivalent flow, has been made by a California court.

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[4] *See Rank* v. *Krug*, 142 F. Supp. 1, 149-154, and the discussion of the point in plaintiffs' reply brief.

[5] Whether or not Miller & Lux, in the full exercise of the appropriative and prescriptive rights reserved, could have so distributed the irrigation water upstream as to deprive plaintiffs' lands of any return flow whatever would depend upon a much more comprehensive analysis of the rights reserved, the distribution system, and the drainage basin of the river than can be made from the evidence in this case. Under the circumstances, the controlling facts here, accepted by both parties, are (1) that the return flow was (as it will continue to be) a dependable source of supply (physically), because of the economics of the upstream irrigation developments; (2) that plaintiffs had riparian rights to the (San Joaquin) water flowing past their lands; and (3) that if those rights were impaired by defendant's action, the impairment was not physical but legal.

Plaintiffs asserted at the trial and later requested a finding to the effect that if defendant would make arrangements to guarantee to them a firm supply of water equivalent to that which was available to them prior to 1951 under their riparian rights, they would accept this guarantee in lieu of damages in this action. Defendant's position, as heretofore noted, is that plaintiffs have the right to the equivalent, wherefore there is no need for the guarantee.

It follows from the foregoing that defendant's position in this suit is that the requisite adjudication can and should be made by this court; that in this instance, as in any other submission of a question of first impression, the decision of a court of competent jurisdiction of what the law is constitutes a decision of what the law was in relation to the rights of the parties at the time the controversy arose.

One of the few points on which the parties to this action are agreed is that these plaintiffs can recover, if and only if, defendant has taken from them water rights having valid existence under California law.

On this basis, plaintiffs' position in relation to the function of the court in this case is not far removed from that of defendant. They agree that the California law by which to determine the validity of their water rights, and whether such rights, if valid, were extinguished by the substitution or survived it, is for determination by this court. The difference between the parties in this connection is one of approach.

Plaintiffs are saying, in effect: As of this moment the California case-law is thus-and-so. From these precedents, and reasoning by analogy and logic, this court can only conclude that under California law the riparian rights of plaintiffs were extinguished by defendant's action. Therefore, compensation is payable as for a taking, and the measure thereof is the difference in value between the lands wet and the lands dry.

Defendant replies, in effect: Granting the California precedents on which plaintiffs rely to be as represented, the fact remains that they cover only part of the subject. The California courts have powers which plaintiffs have not invoked. The facts of the present case call for the exercise of those powers, to the end that plaintiffs may have the water which

they desire and defendant may be excused from payment of compensation.

Stated another way, plaintiffs would have this court adopt and apply a traditional solution: the decision of a question of law (albeit California law) by a court of law. Defendant would have this court assume fully the role of a California court, with the powers invested in such a court by the law of the state, to the end that the case may be considered and decided as defendant believes a California court would consider and decide it.

It is my view that the questions thus raised as to the role of the court which has become the forum for this controversy are crucial to the proper disposition of the case; and that under all of the circumstances bearing upon the matter, of fact and of law, neither of the approaches suggested by the parties is wholly suited to the ends of justice. I propose, therefore, to submit one of my own devising.

The Central Valley Project represents major achievements in engineering and in Federal-State relations. The incidents of accomplishment in both fields have presented and will continue for some time to come to present challenging questions to the courts in the adjustment of water rights. The opinion of Judge Hall in *Rank* v. *Krug*[6] contains several specific examples of such questions. The question which lies at the crux of the instant case is another example.

Plaintiffs were the owners of riparian rights until defendant began the integrated operation of the Central Valley Project. Riparian rights, under California law, are dominant, and are subject only to the overriding policy of the beneficial use provision of the State Constitution.

Once defendant began the integrated operation of the Central Valley Project, the water flowing in plaintiffs' Salt Slough came from the Sacramento River instead of the San Joaquin River. This was the only change. In the classic phrase of riparianism, the flow in Salt Slough continued. "undiminished in quantity and unimpaired in quality."

Does it follow, inexorably, that plaintiffs, riparians yesterday, are trespassers today, simply because the substitution of waters had the effect of removing one of the traditional ingredients of the legal concept of riparian?

[6] 142 F.Supp. 1 (1956).

The affirmative answer upon which plaintiffs insist finds support in reasoning by analogy from the California precedents relating to foreign waters. Upon close scrutiny, however, that support begins to lose its initial strength. None of the foreign water precedents relates to a situation of aspect comparable to the Central Valley Project. Moreover, plaintiffs' answer is not consonant with the historical predilection of the California courts for protecting riparian rights, and it is at variance with the ingenuity those courts have displayed (1) in the application of the beneficial use provision, (2) in so adjusting water rights as to provide the utmost prospect of repose, and (3) in protecting water users with "the full flow of the stream or its equivalent."

The negative answer upon which defendant insists finds support in the elements last described in the preceding paragraph.

It is not the purpose of this analysis to guess at which of these answers, affirmative or negative, a California court would give. The purpose is, rather, to suggest that if this case were pending before a California court, the result might go either way; and a split down the middle would be as much of a likelihood as any.

There are reasons other than the lack of precedents for not deciding this case, in this court, as defendant would have it decided. They stem, primarily, from the fact that the Court of Claims is not a California court.

A California court, with such a case as this one before it, could: (1) decide it on points of law, exclusively, with or without an award of damages; or (2) invoke its equity powers, and resolve the matter more flexibly. The court, in equity, could summon additional parties if it deemed them necessary; impose a physical solution; and award damages.

Assuming the presence of all necessary or proper parties, the California court could hold, in effect: that the substitute water represents a reasonable equivalent of the former natural flow, and must be recognized as a physical solution; that plaintiffs are entitled to an award of nominal damages, in recognition of the impairment of their status as riparian owners; and may recover more than nominal damages to the extent that they can convince a jury that the physical solution affords a less dependable supply, physi-

cally, than they had under their riparian rights; that all other parties to the action are enjoined from interfering with plaintiffs in the use of the substitute water; and that jurisdiction of the matter is retained by the court, for enforcement of its decree, and for modification thereof upon proper showing.

Equity powers are indispensable to the repose of rights decreed in a physical solution. Users' rights to the "equivalent" of the full flow of the stream, or other standard for measuring or describing a water right, depend upon the court's power of injunction, of which the retention of jurisdiction is an integral part.

Inherent in a physical solution is the recognition that the former right of the user, whether it be a riparian right to the full flow of the stream or an overlying right to ground water, has been impaired. The user is required by the court to accept the equivalent, and the user's right to the equivalent attains status in law by the court's decree and the sanctions which the court is empowered to use to enforce its decree.

The necessary powers reside in the State courts and in the Federal courts of California.[7] The Court of Claims, however, has no anchor in the State of California which would authorize it to embark upon the exercise of equity powers, even though it has become the forum for decision of questions of California law. Without the requisite powers it cannot function in this case as a California court would function.

Under the circumstances a pronouncement by this court that the substitute waters provide an equivalent of the former riparian flow (assuming, for the purpose of discussion, that such a conclusion is warranted by the evidence) would be merely a declaration of what ought to be; not of what shall be.

It does not follow, however, from the inability of this court to decree a physical solution, that its only alternative is to

[7] Inasmuch as the United States district courts in California declare and apply the law of the State, the requisite powers must also reside in the court of appeal for the ninth circuit and in the Supreme Court of the United States, at least to the extent required for the review of trial court decisions and decrees.

conclude that plaintiffs' riparian rights were extinguished by the substitution.[8]

On the basis of the facts established by the evidence, and the present state of the California law of water rights applicable to those facts, plaintiffs have not, in my view, established the extinguishment of their riparian rights.

The substitution, without question, impaired plaintiffs' riparian rights, and for that reason they have shown *a* right to recover, even if the recovery should be of nominal damages only. But whether or not plaintiffs' damage has been more than nominal is a question of fact which is not established by the evidence.

It should be noted in passing that no question has been raised, and none is believed to exist, as to the right of plaintiffs to bring this action in this court. As a matter of fact, at the time of the substitution, there was no other forum in which they could have sued the United States for the taking.

Also of interest, incidentally, is the fact that, at the time plaintiffs filed their action in this court, they could have sued the United States in a California court, State or Federal.[9]

The situation in this case is such that, if California law made it possible for plaintiffs to obtain, administratively, a determination of the status of their water rights after the substitution, consideration of the case in this court would be postponed pending exhaustion by plaintiffs of their administrative remedies. The suggestion is, of course, academic (since there were not and are not now any such administrative remedies) except insofar as a parallel may be drawn from the statute waiving defendant's sovereign immunity from suit in water rights cases. Further reference to this possibility appears later.

Counsel for plaintiffs are authority for the following proposition:

> The determination of the water supply available to the owner of a particular tract of land generally in-

[8] It goes without saying that the court can and should so conclude if, on the facts and the law, it deems such a conclusion to be warranted.

[9] The act of July 10, 1952 (43 U. S. C. 666). See *Rank* v. *Krug*, 142 F. Supp. 1, 69-85 (1956).

> volves two inquiries, one of law and one of engineering. In a state such as California, where, as is so often the case, claims exist to the use of water of a stream that in the aggregate exceed the annual runoff, recourse to both the engineer and the lawyer is necessary before a landowner can know precisely what is the relative priority of his right and how much of a supply it can be expected to produce. * * *

In this case, as plaintiffs' counsel observe at the same point in their brief, "* * * there is considerable agreement between the parties * * * with respect to the matters that determine what water supply was and is available to the plaintiffs." The difference between the parties relates to the plaintiffs' legal right to use the water. Plaintiffs say that right was extinguished. Defendant says it was unaffected. The record indicates that it was impaired, but that after the substitution there existed a situation wherein some right may have survived, inchoate though it may have been.

Since recourse to lawyers as well as engineers is standard practice in California land transactions, it would appear that, as to plaintiffs' lands after the substitution, the prices asked and the prices offered would certainly have been affected by the legal advice received by the potential sellers and buyers; and, lawyers being as they are, the advices given may have differed; and these differences may have been reflected in the prices.

It would seem, therefore, that the measure of damages in this case should be determined accordingly.[10]

The measure of damages then would be: the difference, if any, in the market value of the land before the substitution [11]

[10] Market value, before and after, is a quite different standard from the measure of damages for which plaintiffs contend. Their standard, the difference between the value of the lands wet and the value of the lands dry, leaves no room whatever for flexibility, which may have been a very real factor in the market.

[11] Fairness would require the assumption, in connection with the value before substitution, of the prospective continuation of riparian rights. Otherwise, any valuation as of 1951 might reflect the cumulative discount of the years since the construction of Friant Dam and the Central Valley Project got under way. Valuation evidence based on comparable sales would have to be screened accordingly.

and the market value of the land after the substitution, in the orthodox terms of a willing seller and a willing buyer, with neither subject to any compulsion.[12]

The application of such a measure of damages has ample support in California law. It is usual practice in California courts for water users to be required to accept, as compensation, such amounts as they are able to show, to the satisfaction of juries, they have actually suffered.

It is true that, in the California cases of the kind mentioned in the preceding paragraph, the uncertainties which comprise the elements of damage usually relate to physical features rather than legal rights. There is little difference, however, as a practical matter, in proving the uncertainties in either event, since both depend upon technical, professional advice. Engineers advise as to the uncertainties of physical features; lawyers as to legal rights. The average layman on the average jury would be no more likely to be misled by a lawyer's discussion of incorporeal hereditaments than he would by an engineer's dissertation on the coefficient of permeability.

Inasmuch as the Court of Claims has become, in the instant case, the forum for decision of questions of California law, no reason is perceived why this court cannot or should not adopt the California practice in this regard.

Adoption of the procedures hereinabove outlined would imply: (1) the conclusion that on the facts and the law the plaintiffs are entitled to recover; (2) specification that the right to recover is limited to nominal damages unless plaintiffs are able to show by competent evidence and subject to the usual burden of proof that a diminution occurred in the value of their lands as a result of the substitution of waters; and (3) reference of the case to a commissioner of the court pursuant to Rule 38 (c) for further proceedings.

I recommend the foregoing conclusion, specification, and reference. I recommend further that the reference order be made subject to the conditions hereinafter outlined.

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[12] Probative evidence would include, in addition to comparable sales, the testimony of buyers, sellers, traders, and lenders, and of persons with experience in making appraisals for them, each of whom had obtained such legal and engineering advice as he deemed necessary.

Under the term of the act of July 10, 1952 (43 U.S.C. 666), and California procedures relating to declaratory judgments, the way appears to be open for plaintiffs to seek the determination of a California court as to whether their riparian rights were extinguished, or only impaired, by the substitution of waters.

Legally, declaratory relief is likewise available to defendant [13] through the courts of California.[14]

If either of the parties to this suit elects, within a reasonable time after the case has been referred to a commissioner pursuant to Rule 38(e) and before the case has been scheduled for trial on the issue of damages, to seek the judgment of a California court in relation to the status of plaintiffs' water rights after the substitution, the further trial of this action on the issue of damages should be postponed pending decision by a California court; and upon the rendition of such a judgment, either of the parties to this action should be permitted to request reconsideration by this court of the specified measure of damages, and such specification should be subject to modification accordingly.[15]

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[13] The sovereign immunity from suit, to which the statute cited in the preceding paragraph relates, has no bearing upon the capacity of the United States to bring suit, as distinguished from being subject to suit.

[14] Uncertainty of policy in relation to judicial determination of defendant's water rights constitutes a likely impediment to defendant's availing itself of such relief. See *Rank* v. *Krug*, 142 F. Supp. 1, 69, where the court finds that "* * * the United States has * * * boycotted the litigation."

[15] Adjudication by a California court, prior to any award of compensation by this court, is desirable as the only way to enable this court to make an accurate award. If the case goes to judgment in the Court of Claims prior to an adjudication by a California court, the judgment will not preclude a later adjudication by a California court; and in that event, plaintiffs may be deprived of rights of greater value than those for which they were compensated by the Court of Claims; or they may have been compensated for rights of which they had never been legally deprived.

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JAMES R. BROWNING, Clerk

No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1958

H. B. WOLFSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS.

Cases:

Boston Chamber of Commerce v. *Boston*, 217 U. S. 189	6
Ivanhoe Irrigation District v. *McCracken*, 357 U. S. 275	2
Marion & Rye Valley R. Co. v. *United States*, 270 U. S. 280	6
Nortz v. *United States*, 294 U. S. 317	6
United States v. *Gerlach Live Stock Co.*, 339 U. S. 725	2
United States v. *Sponenbarger*, 308 U. S. 256	6

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OPINION BELOW

The opinion of the Court of Claims is reported at 162 F. Supp. 403 and is printed as Appendix A of the petition for certiorari. The opinion of the Commissioner of the Court of Claims is not officially reported and is printed in Appendix B of the petition for certiorari.

JURISDICTION

The order of the Court of Claims dismissing the petition was entered on May 7, 1958. Petitioners' timely motion for a rehearing was overruled on July 16, 1958. The petition for a writ of certiorari was filed on October 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether the petitioners are entitled to recover damages in the Court of Claims for the alleged taking of water rights where petitioners have never been physically deprived of the return flows of irrigation water alleged to have been taken.

STATEMENT

The petitioners brought this action in the Court of Claims to recover compensation alleged to be due them for impairment of riparian rights resulting from the diversion of the natural flow of the San Joaquin River at Friant Dam and the substitution of an equivalent or better supply of Sacramento River water in its place (Fdg. 43). The diversion arises from the construction and operation of the Central Valley Project in California by the United States. This Court has recently decided cases involving this project in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275. The construction and operation of the Central Valley Project are outlined by the Court of Claims in its Findings numbered 1 through 9 and 24 through 33 and are summarized in this Court's *Ivanhoe* opinion.

So far as here material the project uses San Joaquin River water originating above Friant Dam, which is upstream from petitioners, for irrigating land that did not previously have water and substitutes in its place surplus water brought in from the Sacramento River in the Northern part of Central Valley. This exchange began to operate in 1951 and petitioners

brought this suit in 1955. The Court of Claims held that the exchange did not give petitioners a right to compensation because "any impairment there may have been of plaintiffs' rights amounted at most to a technicality. There is no actual damage as a result of the deprivation of the San Joaquin waters and the substitution of the Sacramento waters" (Pet. App. 31).

The facts basic to this conclusion may be summarized as follows: Petitioner's lands are located from two to three miles from the low channel of the San Joaquin River (Fdg. 5). Their lands lie along Salt Slough extending approximately ¾ of a mile from the Slough (Fdg. 44). Lands now owned by petitioners had been declared by California courts in 1933 to be riparian to the San Joaquin River or its sloughs as then owned by Miller & Lux, Inc. (Fdgs. 14, 38). Such lands retained their riparian status when conveyed to petitioners (Fdg. 39). But their riparian rights are "subject and subordinate to the water rights" of their remote grantor, Miller & Lux, Inc., "whether such water rights be riparian, appropriative or prescriptive" to the end that Miller & Lux, Inc., its successors, subsidiary and affiliated companies "may use, enjoy and transfer said water rights, * * * without let or hindrance" from the grantees (Fdg. 35). The United States acquired by purchase and agreement for the exchange of waters from Miller & Lux, Inc., all their rights to the use of the water of the San Joaquin (Fdgs. 24–26). The United States has also acquired the appropriative and riparian rights of other owners, and in some cases negotiated a settle-

ment on the basis of a substitute supply of Sacramento River water (Fdg. 25).

Petitioners are not now demanding compensation for loss of either the direct surface flow or the overflow of San Joaquin River water. Rather petitioners' claims in this case are for the alleged loss of their rights in the return flow of irrigation water (Pet. App. 28). Prior to the Central Valley project there was virtually no direct flow in the river during the crucial summer months when the entire supply from the river was used by Miller & Lux, Inc., in the exercise of its superior water rights, for irrigation of croplands (Fdg. 21). During this crucial summer period the only supply available to the petitioners was the return flow which reached Salt Slough from irrigation water that had been distributed to lands upstream (Fdgs. 40, 41). Ever since the substitution of Sacramento for San Joaquin waters began, petitioners' lands have never been physically deprived, in whole or in part, of the return flows of irrigation water (Fdg. 43 (c)). It is virtually certain that the flows in Salt Slough will be of the same magnitude during the irrigation season so long as the great area of cropland lying generally upstream from petitioners' lands continues to be irrigated (Fdg. 43 (d)). The issue in this case is whether the rights of the petitioners to the return flow have been impaired because of the substitution of Sacramento for San Joaquin water.

The Court of Claims held that petitioners were not damaged because the return flow waters have continued and will, in the foreseeable future, co[illegible]e

unimpaired in quality or quantity. While agreeing that this was so, the trial commissioner had suggested that petitioners be given an opportunity to prove damage resulting from "technical impairment" of their claimed water rights. In this regard the Court of Claims held that petitioners "are not entitled to compensation for a legal technicality. They must first show that something of substance has been taken from them" (Pet. App. 31). The Court of Claims then remarked that petitioners declined the opportunity the Commissioner's solution would have afforded them. (See Brief for the Plaintiff in the Court of Claims, pp. 28–39.) With respect to loss of water rights under California law because of the water substitution, the Court of Claims noted that "No such superior right has been asserted against plaintiffs. None has been established under California law. We believe none exists" (Pet. App. 29).[1] The opinion concludes:

> The United States cannot withdraw from the commitment [to replace waters of the San Joaquin with waters from the Sacramento River] with impunity, and neither can it, with impunity, withdraw from any users such as plaintiffs the waters now supplied in substitution for waters formerly originating in the San Joaquin watershed. [Pet. App. 33.]

ARGUMENT

The decision of the Court of Claims is correct. The court held that no cause of action arises for

[1] As to the questionable nature of petitioners' claimed water rights see footnote at page 6 of opinion (Pet. App. 31).

what could be at most a mere technical taking without any actual damage. This Court has on past occasions sanctioned the dismissal of actions in the Court of Claims where, assuming that there had been a taking or not reaching the question, plaintiffs could not show actual damages. *Nortz* v. *United States,* 294 U. S. 317, 327; *Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280, 282. The mere possibility of some future damage where there has been no present interference with plaintiff's property does not give rise to a cause of action. *United States* v. *Sponenbarger,* 308 U. S. 256, 267. But even assuming a taking and regardless of the forum, the maximum measure of damages in eminent domain cases is the loss which the owner has sustained. *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195.

The Court of Claims held the petitioners failed to establish that rights superior to theirs existed in the return flow of the substitute supply. In effect, petitioners assert they had "riparian" rights in the return flow so long as it was San Joaquin water. They assert this even while acknowledging the superior rights of others who sold their rights to the United States, to appropriate the entire natural flow of the river (Pet. 6). Presumably this right must have been to force upstream owners and appropriators to supply them with the return flow of San Joaquin water or collect damages. But now that these upstream owners and appropriators have sold their water rights to the Government and received in lieu Sacramento River water, petitioners contend they have lost their

"riparian" rights to the return flow. In substance the contention is that these upstream owners and appropriators who sold the San Joaquin water can now recapture and retain the return flow of the exchange water from the Sacramento and are no longer obligated to let it flow past petitioners' land.

Petitioners base their claim of a loss on the "foreign waters" doctrine of California. Petitioners cite this rule as holding that riparian rights attach only to the natural flow of the stream and that they cannot complain if they are deprived of water which would not "in the course of nature" reach their land (Pet. 16). The Court of Claims distinguishes the "foreign waters" cases relied on as not being parallel because none of them involved the complete diversion of a natural stream accompanied by a guaranteed substitution of an equal amount of other waters (Pet. App. 29–30). The court remarked that, if California courts would have recognized "riparian" rights to the return flow of irrigation water in the first place, they may, if called upon to do so, recognize "riparian" rights in exchange waters also. (See note, Pet. App. 31.) [2]

The Court of Claims concluded that the United States was committed "to replace the waters of the San Joaquin River with waters from the Sacramento River, and with specific reference to the area of plaintiffs' lands (the Northern San Joaquin Valley), * * *.

[2] Petitioners emphasize they are willing to trade their "riparian" rights for a contract by the United States guaranteeing them a supply of irrigation water (Pet. 5). Obviously the United States could not enter into any such agreement in view of the nebulous state of petitioners' rights.

Any future withdrawal of such waters would render the United States liable to respond with just compensation as fully as defendant would have been responsible to so respond if it had taken away the natural waters without making an equivalent substitution therefor" (Pet. App. 33). This is as complete a protection of petitioners' rights from any taking by the United States as the Court of Claims could have given them or as they were entitled to. The simple fact is that petitioners are receiving the same quantity and quality of water as they did before. Far from depriving them of such flow the United States, by stabilizing the San Joaquin, is giving them assurance of continued water supply.[3]

Clearly, the court below has not decided any issue of California law in a way that would conflict with applicable state law, or require the granting of the writ of certiorari by this Court.

[3] The petitioners' assertion that, since the decision of the court below, upstream appropriators have in fact contracted to sell a portion of the return flow to another person (Pet. 17–18) adds nothing to their claim. First, it does not appear that such a sale of San Joaquin water would not have been within the admittedly superior rights reserved by Miller and Lux. Second, if such a sale would have been a violation of petitioners' rights, it still may be. Third, the fact that action subsequent to the complaint has resulted in injury, assuming that it has, adds nothing to the right to recover on the complaint.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958